STATE OF MICHIGAN

COURT OF APPEALS

TODD L. LEVITT,

Plaintiff-Appellant,

v

CAREN L. COLLINS and SOUTHWESTERN OAKLAND CABLE COMMISSION,

Defendants-Appellees.

UNPUBLISHED
March 16, 2004

No. 241212
Oakland Circuit Court
LC No. 01-031800-CZ

Before: Neff, P.J., and Wilder and Kelly, JJ.

PER CURIAM.

Plaintiff Todd L. Levitt, producer of a public access cable television program, challenges as restrictive of his constitutional rights to freedom of expression, the cable access policies and procedures promulgated and enforced by defendants, the Southwestern Oakland Cable Commission (SWOCC) and its executive director Caren L. Collins. Plaintiff appeals as of right from the circuit court's order granting defendants summary disposition of plaintiff's claims. We affirm.

I. Standard of Review

Constitutional issues and a trial court's ruling on a motion for summary disposition are reviewed de novo on appeal. *Van Buren Twp v Garter Belt*, 258 Mich App 594, 608-609; 673 NW2d 111 (2003). Ordinances are presumed to be constitutional and must be construed in a constitutional manner if possible; the challenger carries the burden to prove otherwise. *Gora v Ferndale*, 456 Mich 704, 711-712; 576 NW2d 141 (1998).

II. Public Forum

Plaintiff first contends that public access channels constitute a nontraditional type of First Amendment public forum, in which regulations of speech content, including the SWOCC's policies and procedures, become subject to strict scrutiny. In support of this proposition, plaintiff cites only a concurring opinion of two United States Supreme Court justices in *Denver Area Ed Telecom Consortium, Inc v Fed Communications Comm'n*, 518 US 727, 791-794; 116 S Ct 2374; 135 L Ed 2d 888 (1996) (opinion by Kennedy, J., concurring in part and dissenting in

part). The lead opinion by four justices expressly declined to analogize public access channels to a First Amendment public forum, and three dissenting justices opined that public access channels existed on private property that could not be deemed a public forum. *Denver Area Ed Telecom Consortium*, *supra* at 739-742 (opinion by Breyer, J.), 826-831 (dissenting opinion by Thomas, J.).

Plurality decisions of the United States Supreme Court do not constitute binding precedent in Michigan. *People v Anderson*, 389 Mich 155, 170; 205 NW2d 461 (1973). Because plaintiff has not provided any authority in support of this argument on appeal, we decline to further address this question. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002).

III. Overbreadth

Plaintiff next argues that the SWOCC policies and procedures are overbroad because they restrict freedom of expression on their face, and their mere existence creates the constitutionally unacceptable risk that the desired expression of third parties not before the court might be chilled. Michigan courts have recognized that the overbreadth doctrine "allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected." *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000). But nowhere in plaintiff's formulation of his argument with respect to the overbreadth issue does he identify even a single specific provision within the SWOCC policies and procedures that this Court could analyze to determine whether it violates the First Amendment on the basis of overbreadth. Plaintiff may not simply announce his contention and leave it to this Court to discover and rationalize the basis for his claim. We conclude that plaintiff has waived appellate review of this issue. *Korth v Korth*, 256 Mich App 286, 294; 662 NW2d 111 (2003).

IV. Vagueness

Plaintiff also asserts that the SWOCC policies and procedures contain several provisions that are unconstitutionally void for vagueness.

> An ordinance is unconstitutionally vague if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages subjective and discriminatory application by delegating to those empowered to enforce the ordinance the unfettered discretion to determine whether the ordinance has been violated. *Plymouth Charter Twp v Hancock*, 236 Mich App 197, 199-200; 600 NW2d 380 (1999).

In a vagueness challenge we review the entire ordinance, giving its words their ordinary meanings that may be discerned by reference to dictionaries, treatises and the like. *Van Buren Charter Twp v Garter Belt*, 258 Mich App 594, 631; 673 NW2d 111 (2003).

Plaintiff primarily challenges as unconstitutionally vague the following provisions of the SWOCC policies and procedures delineating the responsibilities of public access programmers:

> The producer shall not submit material that is unlawful, such as, but not limited to:
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> a. Material which is obscene.
>
> b. Material which violates copyright or trademark laws.
>
> The producer shall not submit material that is defamatory, libelous or slanderous.
>
> The producer shall not submit material that advertises or promotes a commercial product or service, or directly solicits funds for commercial or private gain (through a call to action).

Plaintiff also mentions as potentially vague the "Rule[] of Conduct" prohibiting a public access programmer from engaging in "activities that violate federal, state, or local laws and ordinances."[1]

We conclude that the challenged provisions supply fair notice of the type of conduct prohibited. The plain and ordinary meaning of the adjective "unlawful," as reflected within dictionary definitions, is illegal, criminally punishable, or contrary to law. Black's Law Dictionary (7th ed); *Random House Webster's College Dictionary* (2d ed). A person of ordinary intelligence, who is presumed to have knowledge of the law, would have a fair and reasonable opportunity to ascertain what is prohibited by consulting the relevant statutes or ordinances governing his particular proposed conduct, judicial interpretations thereof, and the common law. *Van Buren Charter Twp*, *supra* at 631. See also *People v Turmon*, 417 Mich 638, 657; 340 NW2d 620 (1983).[2] Pursuant to the above logic, the rule of conduct prohibition against an access user's "engage[ment] in activities that violate federal, state, or local laws and ordinances" likewise provides ample notice of the prohibited conduct because a reasonably intelligent person could ascertain whether particular conduct is unlawful by referring to the applicable federal or state law or local ordinance, and judicial interpretations thereof.

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[1] While plaintiff also mentions the rule of conduct prohibiting the presence of "alcoholic beverages or drugs . . . on any community access premises," he does not argue on appeal that this provision qualifies as unconstitutionally vague.

[2] Plaintiff does not explicitly label as vague the two specific examples of unlawful material that the policies and procedures provide for illustrative purposes: obscene material, the precise definition of which appears within the policies and procedures, and material violative of copyright and trademark laws.

We further conclude that a person of ordinary intelligence would have no difficulty ascertaining what conduct fell within the scope of the restriction against "material that advertises or promotes a commercial product or service." Even assuming that the terms of the restriction on their face contained some lack of clarity, a person of reasonable intelligence could discover the extent of the prohibited conduct simply by resorting to dictionary definitions, which reveal the plain and ordinary meanings of the selected terms. *Van Buren Charter Twp, supra* at 631.

"Advertise" primarily means "to announce or praise (a product, service, etc.) in some public medium of communication *in order to induce people to buy or use*." *Random House Webster's College Dictionary*, *supra* (emphasis added). The most relevant definition of "promote" in the context of the restriction means, "to encourage the sales, acceptance, or recognition of, esp. through advertising or publicity." *Id*.; *Dep't of State v Michigan Ed Ass'n-NEA*, 251 Mich App 110, 119; 650 NW2d 120 (2002). The adjective "commercial" connotes something "produced, marketed, etc. with emphasis on salability, profit, or the like." *Random House Webster's College Dictionary*, *supra*. Black's Law Dictionary, *supra*, defines, in relevant part, a "product" as "[s]omething . . . distributed commercially for use or consumption . . . ." and a "service" as "[t]he act of doing something useful for a person or company for a fee."

These definitions make clear that the restriction intends to curtail a public access programmer's promotion of a purchasable product or service with the intent or desire to earn a profit through viewer purchases of the product or service. We cannot conclude that the restriction against advertising or promoting commercial products or services fails to provide fair notice of the type of conduct prohibited.

In light of the readily ascertainable meanings of these challenged terms, plaintiff's protestations that executive director Collins had unfettered discretion to enforce the unconstitutionally vague SWOCC policies and procedures as she saw fit ring hollow. The policies and procedures establish on their first page that (1) the SWOCC has responsibility for administering community access services; (2) the SWOCC will carry out the administration of community access services through its executive director, who will "oversee the day to day functions of programming . . . and guidance for cable television productions"; and (3) SWOCC "*is responsible for the conduct of its employees and their adherence to these policies*" (emphasis added). Because Collins and the SWOCC must enforce the terms of the policies and procedures, and because the specific provisions challenged by plaintiff plainly describe the types of prohibited material, the challenged provisions do not vest in Collins the unfettered discretion to determine whether they have been violated. *Van Buren Charter Twp, supra* at 632.

Because the provisions challenged as vague are clear and unambiguous as a matter of law, we conclude that the circuit court properly granted summary disposition to defendant with respect to the vagueness issue.

V. Prior Restraint

Plaintiff further contends that the SWOCC's enforcement of the policies and procedures to justify plaintiff's suspension without notice from the public access facilites created an unconstitutional prior restraint.[3]

Plaintiff's suggestion that his suspension occurred without notice lacks merit. Collins suspended plaintiff because he violated the rule of conduct explaining that "[n]o alcoholic beverages or drugs are allowed on any community access premises." Plaintiff does not contend on appeal that the language comprising the alcohol prohibition is vague or is otherwise unconstitutional. The SWOCC policies and procedures also plainly provide that "any violation of these policies" constitutes a basis for punitive "action, up to and including suspension of facility privileges."

Plaintiff signed two documents expressly declaring that he had read and understood the policies and procedures, and that he agreed to comply with them. Plaintiff's deposition testimony acknowledged his understanding of the policies and procedures, and that his use of alcohol in the studio violated the rule prohibiting alcohol. In light of the clear and unambiguous nature of the rules and plaintiff's agreement to abide by them, we conclude that plaintiff had notice of the rules before he violated them by bringing alcohol into the studio. Furthermore, as plaintiff concedes, he received notice that his conduct warranted suspension in the form of a March 15, 2000, letter from Collins.[4]

We conclude that plaintiff's suspension itself, which arose from his disregard of the rules by which he had agreed to abide, does not constitute a prior restraint. As this Court recently explained, "The term 'prior restraint' is used to describe an administrative or judicial order that forbids certain communications in advance of the time that the communications are to occur. Temporary restraining orders and permanent injunctions, which actually forbid speech activities, are classic examples of prior restraints." *Van Buren Charter Twp*, *supra* at 622-623. In this case, undisputed evidence reflects that defendants never prevented an episode of plaintiff's program from being cablecast.

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[3] Plaintiff makes no argument specifically challenging defendants' imposition of a six-episode prescreening requirement as creating an unconstitutional prior restraint. Plaintiff also fails to argue within this issue that his removal of a brief portion of his sixth program during the probationary period, on the basis of defendants' belief that it contained prohibited commercial speech, constituted a prior restraint. When a party does not raise or develop particular allegations of error on appeal, this Court generally declines to address them. *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 34; 654 NW2d 610 (2002).

[4] The record also contains a March 13, 2000, letter from Collins to plaintiff memorializing their prior discussion regarding his violation of the alcohol rule.

Plaintiff's suspension *after* a rule violation is more akin to a subsequent punishment than a prior restraint. "Enforcement of [a] content-neutral, constitutional ordinance is simply not a prior restraint." *Id.* at 626. Because the alcohol rule of conduct that formed the basis of plaintiff's suspension is not directed at a particular category of speech, and therefore qualifies as content neutral, and because plaintiff has not even argued the unconstitutionality of the alcohol prohibition, defendants' enforcement of the rule simply does not constitute a prior restraint. Further, because the alcohol rule is clear and no relevant facts concerning this issue appear in dispute, we conclude that the circuit court properly granted defendants summary disposition of plaintiff's prior restraint claim.

In a related assertion, plaintiff avers that he essentially had no right to appeal his suspension. But plaintiff admittedly did have access to and pursued the appellate rights accorded him pursuant to the SWOCC policies and procedures. Plaintiff ultimately obtained a hearing before the SWOCC board, at which he had the opportunity to speak at length in support of his position, and the board significantly reduced his suspension period.[5]

While the SWOCC appellate provisions do not prescribe a precise standard of review applicable on appeal to the board, we reject plaintiff's contention that the policies and procedures invested the board with unlimited discretion and offered no "criteria upon which to base a decision." The SWOCC promulgated the policies and procedures governing cable access, none of which plaintiff has demonstrated are unconstitutionally vague or overbroad. Within the description of appellate rights, the policies and procedures also proclaim that "[a]ll policies shall be interpreted and construed so as to conform with federal, state and local law." The SWOCC expressly bound itself to abide by the terms of the policies and procedures. Consequently, the plain standards within the policies and procedures, as well as federal, state and local law, constrain the SWOCC board's decision-making authority.

VI. Commercial Speech

Plaintiff lastly asserts that the commercial speech restriction and other provisions of the policies and procedures impermissibly infringe on his First Amendment rights.[6]

The sole instance in which defendants requested an alteration of plaintiff's program arose because they believed plaintiff had violated the commercial speech prohibition. A videotape filed within the circuit court record contains a brief segment of plaintiff's program during which he uttered the following, relevant statements:

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[5] Although the policies and procedures specifically contemplate judicial review of SWOCC board decisions, plaintiff did not appeal the board's ruling concerning his suspension.

[6] Although plaintiff mentions in his brief the rule prohibiting conduct violative of federal, state or local law, which plaintiff misrepresents as prohibiting the *depiction* of unlawful conduct, plaintiff does not elaborate an argument on appeal that this provision amounts to an unconstitutional, content-based restriction on speech. *Bloomfield Charter Twp*, *supra* at 34.

> You're saying, "Who is this guy?"
>
> Well, I am an attorney. I say it over and over. You know, no hints there.
>
> By the way, I'm a criminal attorney. But a lot of you out there think I just do criminal cases. I also do personal injury, auto negligence, medical malpractice. I'm not gonna turn *anybody* away, okay. I just want to get that straight.

We conclude that plaintiff's statements plainly promote to viewers his legal services, in exchange for which he presumably would seek compensation, and thus fall within the unambiguous scope of the commercial speech prohibition.

Plaintiff does not present relevant authority in support of the proposition that no regulation of commercial speech can occur within the context of broadcasting or cablecasting. See *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council, Inc*, 425 US 748, 773; 96 S Ct 1817; 48 L Ed 2d 346 (1976). Plaintiff also fails to offer any explanation why, in light of his failure ever to object to Collins' suggestion that he remove the commercial speech or appeal her decision to the SWOCC board, he should have standing to raise the issue within the instant appeal.

Even assuming that plaintiff provided this Court with appropriate authority in support of his position and has the right to assert this argument before this Court, we conclude that the prohibition of commercial speech within the SWOCC policies and procedures is constitutional under the test enunciated by the United States Supreme Court in *Greater New Orleans Broadcasting Ass'n, Inc v United States*, 527 US 173 183-184; 119 S Ct 1923; 144 L Ed 2d 161 (1999), a case that addressed a broadcast-related ban of private casino advertising. Because the speech of plaintiff that required editing falls within the plain scope of the commercial restriction, and because the commercial restriction qualifies as a constitutionally permissible restriction of commercial speech, the circuit court properly granted defendants summary disposition of plaintiff's First Amendment challenge to the commercial restriction. See Also *Goldberg v Cablevision Sys Corp*, 261 F3d 318, 328 (CA 2, 2001).

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly